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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. 137

THE TIMKEN-DETROIT AXLE COMPANY,

Petitioner,

vs.

CLEVELAND STEEL PRODUCTS CORPORATION,

Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5847

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To the Honorable Harlan F. Stone, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

In this case, The Timken-Detroit Axle Company, filed its petition for writ of certiorari presenting four questions relating to clarification of the patent law. This petition was denied on October 8, 1945. Since the filing of the original petition for certiorari the decision of the Court of Appeals in *O'Leary v. Liggett et al.*, 66 U. S. P. Q. 219, (C. C. A. 6) has called attention to the importance of several of the points presented in the original petition and particularly to point 2 which is as follows:

> "2. Confusion among all patent Tribunals below regarding such questions as 'invention and mechanical skill' and 'sufficiency of disclosure' which has arisen since the institution of certain alleged 'doctrinal trends,' including 'standards of invention' and 'sufficiency of disclosure,' *and which has resulted in a decline of 54% in the per capita applications for patents in the United States between 1930 and 1943, a decline in patents issued in the United States of 41½% per capita between 1933 and 1943, a decline in Court adjudications*

favorable to inventors, and consequent parallel declines in the making of inventions in the United States which has, and is, reflected by concern and alarm in the public press all over the United States."

We respectfully request reconsideration by this Court of this question presented by our petition for writ of certiorari. This question is an important one. What rights, if any, are given by the United States with the grant of Letters Patent for inventions? The metes and bounds of these rights are presently hidden in a fog of uncertainty. A settlement of the present confusion in patent causes will have a profound effect on the postwar future. This question should be, but has not been as yet, specifically settled by this Court.

I.

The Confusion Continues Unabated: The confusion on the questions involved in this controversy, and pointed out in our Petition for Writ of Certiorari and especially at pages 5 to 16, inclusive, thereof, have continued and no doubt the disastrous consequences of these confusions have also continued. This is shown for example by the decision of *O'Leary v. Liggett* (*supra*) handed down since we filed our Petition.

Here Judge Martin, who wrote the opinion for the Court, discusses the alleged changes in the standards of invention, saying:

"The patent law is presently in a state of flux."

All of this is directly contrary to what the Court of Customs and Patent Appeals said in *In re Shortell,* cited and discussed at pages 6 and 7 of our Petition for Certiorari, and all of which other Courts in other Circuits refuse to abide by even if it is true, as we also showed.

After discussing many of the former specific rules on the standards of invention, such as simplification, change

in materials, etc., Judge Martin says that a "higher standard of invention" is now required "in our Circuit," i.e., the Sixth Circuit. All of this emphasizes the diversity of practice in different Circuits upon what is probably the most important question in the whole patent law, i.e., what is invention and how is invention to be distinguished from mechanical skill?

Indeed, the diversity of views on this question in the different Courts of Appeals is so marked that the controlling question in patent litigation today is: In what Circuit will the patent be adjudicated?

II.

The records show that this Court has granted certiorari in the case of *Halliburton Oil v. Walker* (see 14 Law Week 3139 Oct. 16, 1945). An examination of the decisions in this cause (59 U. S. P. Q. 179 in the District Court and 146 Fed. (2) 817) and 149 Fed. (2) 896 in the Court of Appeals show that the point upon which certiorari was granted, i.e., the validity of one of the three patents in suit, was sustained by concurring decisions below; that is, this Court granted certiorari where there were concurring decisions holding the patent valid. The questions for the grant of certiorari there involved, though differing in phase, were similar and complementary to the same questions in the instant cause, i.e., (1) invention or mechanical skill and (2) sufficiency of description. Thus both causes involve the same general questions on concurring findings below. Thus the causes are not only parallel in issues, but in history below. The diversity of holdings, i.e. validity in the one cause and invalidity in the other, would present the opportunity of ruling on the same issues from the different sides and angles.

We point out that if the Petition for Certiorari in the instant cause were granted, the two causes, if considered in proximity to each other, would supply enough back-

ground and enough issues offered from different angles for this Court to settle these confusing differences in practice followed in the different Circuits below and check, if not stop, one way or the other, the disastrous consequences of the confusion and the changes that are going on, and at least prevent the current jockeying of the patentee and the alleged infringer to have the patent adjudicated in the Circuit most favorable to him and still the debates between the different courts of appeals on these questions.

Wherefore your Petitioner respectfully requests reconsideration of the Petition for Writ of Certiorari in this case and grant the same.

Respectfully submitted,

F. O. Richey,
Wm. A. Strauch,
Attorneys for Petitioner.

I hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

F. O. Richey.